Supreme Court, U.S.
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No. 10-55

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In The
Supreme Court of the United States

XIAOPING YAO,

Petitioner,

v.

VISA INCORPORATED,
VISA USA INCORPORATED,
INOVANT LLC,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

November 2008 I filed a complaint against Visa Inc. for discrimination and retaliation I received between 2006 and 2007. In August 2009 defendant filed Motion for Summary Judgment (Dkt. no. 80) to dismiss the Jury trial. I filed opposing affidavit titled Response to Defendant's Motion for Summary Judgment (Dkt. no. 86)[1] in September 2009, which controverts 34 material facts stated in defendant's motion. District Judge Liam O'Grady interrupted oral argument on September 25, 2009 so that none of facts in dispute about what really happened between 2006 and 2007 has been orally argued in the court. Knowingly based on defendant's lies, Judge O'Grady issued Memorandum Opinion on November 5, 2009 and an order to grant defendant's Motion for Summary Judgment on November 6, 2009.

Now the question is: Should Judge O'Grady's order that was based on lies be voided? Some specific questions regarding Judge O'Grady's ignoring defendant's lies are presented as follow:

1. Why did Judge O'Grady interrupt the oral argument so that none of the facts in dispute about what really happened between 2006 and 2007 went to oral argument and none of defendant's witnesses who submitted declarations came to the court to testify?
2. Defendant's witness Mr. Drummond claims that I chose not take BMC training in June 2006. I attached an original copy of travel expense report

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[1] The title will be shortened as "Response" for the remainder of this petition.

to my "Response" to prove that I traveled to California to take BMC training in June 2006. The travel expense report was approved by Mr. Drummond for reimbursement. Why does Judge O'Grady still believe that I did not take the training in June 2006? Judge O'Grady should have found that Mr. Drummond lied.

3. Based on what evidence did Judge O'Grady believe that Mr. Washington complained my accent even though the evidence shows that he had never met me and had never talked to me?
4. Visa Human Resource clearly stated in an email that acknowledge review was not required. As a Visa director Mr. Drummond knew Visa's review procedure and he also read the email but Mr. Drummond insisted and he is still insisting that acknowledge review was required. Why does Judge O'Grady ignore Mr. Drummond's lie?
5. Defendant denied first and admitted late that Mr. Drummond had changed performance review procedure. Why Judge O'Grady did not let defendant explain the reason for change from denial to admission? Why Judge O'Grady did not ask Mr. Drummond for an explanation on his change of performance review procedure?
6. I did not have the opportunity to ask defendant to show their evidence for the estimate of 4 – 6 weeks to complete Listener in the court because Judge O'Grady stopped the oral argument. Where did Judge O'Grady find that estimate?
7. How did Judge O'Grady resolve the contradictions between Mr. Drummond's following statements:

   a) It took Yao until early October 2006, over four

months, to complete the code.

b) It had taken Mr. Yao four months, and he was still not finished (on November 1, 2006).

Does Judge O'Grady think I completed the Code or not? What reason?

8. The functionality to return receipts to sending consoles was requested on November 28, 2006. I was already removed from Listener task on November 10, 2006 but Mr. Drummond blames me for not implementing that functionality. Why Judge O'Grady did not find Mr. Drummond's blame ridiculous?

9. In "Response", I provided one email to show that I fixed CPU consumption and memory leak problems on October 11, 2006 and another email to show that Mr. Yim confirmed my fixes on March 12, 2007. In 2009 both Mr. Drummond and Mr. Yim claimed that Mr. Yim had fixed both problems without any evidence. How did Judge O'Grady resolve the contradictions between my evidences and defendant's claims?

10. How did Judge O'Grady resolve contradictions among defendant's following statements?

    a) Mr. Drummond claimed in March 2007 that the Listener running in production was Mr. Yim's code. But

    b) Mr. Yim admitted in April 2007 that the Listener running in production was based on my code.

    c) Mr. Drummond claimed in 2009 that Listener did not run in production until May 2007.

    Does Judge O'Grady think if Listener was running in production before May 2007 or not?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following identifies all of the parties appearing here, before the United States Court of Appeal for the Fourth Circuit, and before the United States District Court for the Eastern District of Virginia Alexandria Division:

Xiaoping Yao is the Petitioner here, was the Plaintiff – Appellant in Appeal Court and the Plaintiff in the District Court.

Visa Incorporated and its wholly-owned subsidiaries Visa USA Inc. and Inovant LLC are Respondents here, were the Defendant – Appellee in Appeal Court and Defendant in the District Court.

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The opinion of the United States Court of Appeals for the Fourth Circuit, dismissing the appeal, is unpublished and is reprinted in the Appendix to the petition at 2a-3a. Its docket number is 17 under case no. 09-2342 in the Appeal Court. The District Court's Memorandum Opinion is unreported and is reprinted in the Appendix at 6a-21a. Its docket number is 94 under case no. 1:08-cv-1181.

JURISDICTION

District Court entered judgment on November 5, 2009. The Court of Appeals simply affirmed District Court's judgment on March 19, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

1. Fed. R. Civ. P. 56(e)(1):

   "...If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit..."

2. Local Civil Rule 56(B):

   "...In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion."

STATEMENT OF THE CASE

In August 2005 I started working for Visa as a software engineer at Mclean, Virginia. One year late my manager Tracy Drummond who worked at Foster City, California pushed me to take American English Pronunciation class in the reason that some co-workers complained my accent to him in summer of 2006. Then he gave me a low annual performance rate based on my weak English skills although he agreed that I did good work. In a phone conversation I asked Mr. Drummond who complained my accent. Mr. Drummond said three names. I immediately told him that I had never met one person he mentioned, his name is Eric Washington. I never talked to him before and I did not even know him. Mr. Drummond did not response to what I said. After phone conversation he removed me from the task that I was the only developer and assigned me to another development task in the reason of tight schedule for that task. He raised my performance rate to average. Then he changed review process to ask all his employees to electronically sign their reviews before communicating bonus information to each of them. According to Visa's review process, signing performance review was not required and it should be the last step in performance review after communication and distribution of bonus. I did not sign my review and filed a discrimination charge to EEOC on November 20, 2006. Thereafter Mr. Drummond stopped mention of my accent but started making my attendance and development work as performance issues. On March 12, 2007 he sent me a memorandum that lied about my work performance.

For example, he changed the reason of reassigning my task to that I delayed my task from originally planned 4 – 6 weeks to 4 months. Based on false descriptions in his memorandum he installed a performance improvement plan on me. I expressed rejection to PIP and asked Visa to investigate the matter because the descriptions on my work performance were not true, and the PIP was not even installed following normal procedure. According to the memorandum, the PIP actually started from March 4, 2007 but Mr. Drummond informed me on March 12, 2007. I took two weeks FMLA from March 14, 2007 and my son was put into the emergency room by his pediatrician on the next day. When I backed to work on March 29, 2007 Visa terminated my employment. I filed amended charge to EEOC on April 6, 2007. In August 2008, EEOC dismissed my charge and issued the right to sue.

A. Proceedings in the Courts

On November 12, 2008 I filed the discrimination and retaliation complaints against Visa Inc. in US District Court for the Eastern District of Virginia Alexandria Division. The case was set for jury trial on October 6, 2009. On August 28, 2009 defendant filed a motion for summary judgment to dismiss the trial, which included four declarations from Visa employees. On September 16, 2009 I filed the opposing affidavit "Response". On September 21, 2009 defendant added another declaration of Kin Yim.

At the court hearing on September 25, 2009, issues that are not directly related to my complaints went through the oral argument. The argued issue

was whether Visa Inc. is a right defendant. I presented evidence that was attached to "Response" as Exhibit 3, which proved that defendant's witness Michelle Light had lied in her declaration. Judge Liam O'Grady ruled against defendant based on my evidence. Next, I asked defendant's attorney Katherine Pregel where she got the wrong information in her email sent to me on April 22, 2009. Ms Pregel tried to allure me to substitute defendant by providing me false information in her email that even contradicts to her client's statements. While Ms Pregel was thinking how to answer my question Judge O'Grady stopped her from answering. She withdrew from the case on October 16, 2009 so she avoided facing the question again. Thereafter I argued that the declaration of Kin Yim had been falsely created based on my phone conversation with Mr. Yim. Defendant was not able to argue with me in the court. Obviously defendant's credibility was really in trouble. Judge O'Grady should have rejected declaration of Kin Yim and all other defendant's declarations because two of them were found in bad faith. At that time, Judge O'Grady stopped the court hearing and removed the case from trial docket. He sent the case to advisement for settlement and said that no party should file any proceeding further.

Thus, none of the facts in dispute for what really happened between 2006 and 2007 were argued in the court. Those facts in dispute include accent complaints and discrimination, BMC & NewScale training, Mr. Drummond's lies, performance review, time to complete Listener, attendance problem, performance improvement plan, retaliation, etc.

After the settlement failed, I went to Judge O'Grady's office on November 2, 2009 and submitted a letter that asked to continue oral argument. Judge O'Grady ignored my request and issued his Memorandum Opinion on November 5, 2009 (Appendix, 6a). His Memorandum Opinion is entirely based on defendant's four declarations except the one proved lying. One of these four declarations, Yim Declaration, had its veracity in question. All these declarations contain many lies that have been controverted in my "Response". All paragraphs that Judge O'Grady uses to support his judgment have not been orally argued in the court. Judge O'Grady violated Local Civil Rule 56(B) by using controversial facts to support his judgments. Judge O'Grady's order that granted defendant's summary judgment was entered on November 6, 2009.

I filed an appeal notice to US Court of Appeal for Fourth Circuit on December 2, 2009. A document titled "Appeal" was attached to the notice (Dkt. no 98, Attachments 1). The "Appeal" describes 21 lies made by defendant. On December 29, 2009 I filed Informal Brief to Court of Appeal. On March 19, 2010, Circuit Judges Niemeyer, Motz, and Davis denied my appeal without holding oral argument (Appendix, 2a), which kept defendant's witnesses from cross examination.

Appeal Court did not have new judgment but affirmed what district Judge O'Grady had made. Therefore, the judgment sought to be reviewed in this petition for writ of certiorari is Memorandum Opinion that was entered by district Judge Liam O'Grady on November 5, 2009

On April 2, 2010 I filed Petition for Rehearing

with Petition for Rehearing En Banc. I also filed my declaration and a short document titled "Visa's 23 lies." Circuit Judges just simply denied my petition for rehearing as well as my declaration and Visa's 23 lies on April 20, 2010.

B. Lies in Defendant's Declarations

Judge O'Grady wrote that his Memorandum Opinion is based on following paragraphs from defendant's four declarations: "Drummond Decl. at ¶ 20-28, 36, 37, 40, 45-48, 68." (Appendix, 13a). He added ¶53 late (Appendix, 18a). "Goldman Decl. at ¶8-16." (Appendix, 13a). "Torrise Decl ¶9-10." Id. "Decl. of Kin Yim at ¶ 19." (Appendix, 15a). All these paragraphs were controverted in my "Response" and none of them were orally argued in the court since Judge O'Grady stopped the oral argument. Notice that he uses declaration of Kin Yim whose veracity was still in question. He does not refer declaration of Michelle Light because her declaration was found containing lies in court hearing on September 25, 2009. Due to word limitation for this petition I will just prove with reprinted evidences that some critical paragraphs referred to in Judge O'Grady's Memorandum Opinion are made of lies and false statements. The other paragraphs would be proved of lies automatically since they depend on those critical paragraphs. Original copies of evidences are ready to submit.

> Drummond Decl. at ¶ 20:
> "20. Mr. Yao chose not take the BMC training offered in June. ..."

Mr. Drummond's lies start from the first

sentence. In fact I traveled to Pleasanton, California to take the BMC training with other co-workers from June 5 to June 17 of 2006. Two evidences are reprinted in Appendix at 22a-23a: The travel expense report (partial) and the BMC certificate of completion class. The original copy of travel expense report (15 pages) has been sent to defendant several times. Actually defendant still stores the original one in their computers. The expense report was approved by Mr. Drummond for reimbursement in June 2006. I respectfully ask Justices in this court to find that Mr. Drummond lies and reject his declaration unless defendant can prove that my evidences are false.

Mr. Drummond's declaration at ¶20 is controverted in statements of my "Response" on pages 5, 18, 25-26, 39. Judge O'Grady has violated Local Civil Rule 56(B) and used Mr. Drummond's lies to support his conclusion that I was recalcitrant to attend training (Appendix, 13a).

Drummond Decl. at ¶ 21:

> "21. To make up for missing the live NewScale training, I told Mr. Yao that he could take some NewScale training on-line. However, I did not consider this training to be as effective as the live training at OCW because the live training was tailored to VISA's needs and would have provided Mr. Yao with the opportunity to work with others in his group in person. In contrast, the on-line training was generic and not tailored to VISA. Moreover, Mr. Yao's on-line training presented an added cost to VISA since the Company already paid for

the live training."

When calling Mr. Drummond for canceling the trip, I told him that I was going to take NewScale remote training. Mr. Drummond repeated that by writing "you said you would find training remotely through local or online avenues" in his memorandum dated on March 12, 2007 ("Response", Exhibit 19, p2). Notice he used the word "find" that I did not use. I did not need to "find" the remote training. The remote NewScale training was printed as feasible in project status meeting agenda ("Response", Exhibit 20-23). I only need to take it when it was made available.

I took the available NewScale remote trainings arranged by project manager Mr. Torrise and NewScale consultant Tajan Kenkre in December 2006. I was not the only one who took the classes. Many Visa employees from other departments took the remote classes too. Co-workers from my same group also took the classes with me, so there was no extra cost added. Considering saved travel expense, my overall training cost was greatly reduced.

Mr. Drummond changed his words from that "you said you would find training remotely" to "I told Mr. Yao that he could take some NewScale training on-line". He also exaggerated the number of my cancellation of trips. Cancellation of NewScale training was never a performance issue until after I filed EEOC charge in November 2006. According to Local Civil Rule 56(B) Judge O'Grady should have not admitted this paragraph as fact because it was controverted in "Response" on pages 5-6.

Drummond Decl. at ¶ 22:

> "22. After the beginning of the VIPER project, during the summer of 2006, I began receiving comments from others on the project that they had difficulty communicating with Mr. Yao, due in part to his accent and in part to his defensive tone and attitude. When Mr. Yao communicated technical information, he would do so in Chinese to the other Chinese consultants. However, he could not effectively communicate with other members of his group and his communication problems made it difficult for his co-workers to work with him on projects."

On September 6, 2006 Mr. Drummond called my company's cell phone to tell me that he received complaints from some co-workers that they had difficulty communicating with me due to my accent. On January 12, 2007 Visa's attorney Mr. Jason Branciforte repeated the word complaints to EEOC: "In the Summer of 2006, Mr. Drummond began to receive complaints from some of Mr. Yao's co-workers that they had difficulty communicating with Mr. Yao." ("Response", Exhibit 7, p3). However Mr. Drummond changed his word from complaints to comments in 2009.

There is clearly a difference between complaint and comment. When a person complained to Mr. Drummond about his co-worker's accent he expected Mr. Drummond to take action because the complaint implied his co-worker's accent affected their communication. However, a comment does not expect an action. If the person just commented his co-

worker's accent it just meant that his co-worker had accent but he could still understand co-worker's speaking. On September 6, 2006 Mr. Drummond pushed me to take an American English Pronunciation class in the reason that he received complaints from my co-workers regarding my accent. Now Mr. Drummond admits that he only receives comments. Then he proves himself that he pushed me to take American English Pronunciation class just because he or someone else did not like my accent. This is no doubt discrimination against my origin.

What is the true reason that Mr. Drummond changes his word from complaint to comment? The answer is that defendant knows that one complainer that Mr. Drummond told me would look extremely ridiculous in the court, which will be elaborated in the next section.

I had been working for several companies in DC metro area about 9 years before joining Visa. In previous companies no colleagues or company's clients ever complained my accent.

From July 25 to August 4 of 2005 Visa's three managers and three technical employees interviewed me. The total conversation time was about three hours. I was never asked to repeat a single word during interview. I was offered the job of software engineer, a clear indication that my accent was not concerned by Visa. Started on August 29, 2005 my initial work at Visa was to support legacy service tools. Visa employees called or emailed me for service tool problems they had. I resolved the problems and called or sent emails back to notify the users. There

was no complaint against my accent. Actually, there was no complaint at all. After I worked for Visa almost one year some colleagues started complaining my accent. Does that sound logical?

Mr. Drummond made another lie that I could not communicate technical information in English. I was assigned to develop Listener using C++ computer language. I had learned IT technology including C++ in English in US and had been working in US for almost 10 years. I did not know the Chinese counterparts to English terminologies in software engineering, specifically in C++. It is common sense that there would be no technical communication if you don't know the technical terminologies. On the contrary, I cannot effectively communicate technical information in Chinese. I can only have technical communication in English.

I have been asking Mr. Drummond to provide any example of difficult communication due to my accent. Defendant declined, which indicates there were no either accent complaints or comments. Mr. Drummond's lies are controverted in "Response" on pages 6, 12-16, and 31-32. Judge O'Grady violated Local Civil Rule 56(B).

> Drummond Decl. at ¶ 23:
>
> "23. Specifically, during the summer of 2006, I received comments from my supervisor, Karla Goldman, Vice President of Business Service Management, David Ward, Project Lead for the VIPER project, and Eric Washington, a Project Manager on the VIPER project, that they had difficulty understanding Mr. Yao. These individuals

> were exposed to Mr. Yao's communication skills by virtue of their work on the VIPER project. As my supervisor, Ms. Goldman had occasion to speak with all of the employees on the project. As Project Lead, Mr. Ward also communicated with everyone on the project. Finally, all members of the group, including Eric Washington and Mr. Yao, participated in weekly project status conference calls. Accordingly, Mr. Washington had heard Plaintiff's accent and had difficulty understanding him."

Anyone who read the final sentence in this paragraph would feel puzzled: Did Mr. Washington complain Yao's accent because he had difficulty understanding Yao through telephone conferences? Did he make sure it was not the quality problem of the phone? This is an example how a lie ends on ridicule.

On October 23, 2006 I called Mr. Drummond to discuss the low performance rating he had given to me. During the phone conversation I asked Mr. Drummond who complained my accent to him. Mr. Drummond waited seconds then gave me three names: Karla Goldman, David Ward and Eric Washington. I told him immediately that I had never met Mr. Washington in person. Mr. Washington worked at Foster City, California. I never worked with him on same tasks and never spoke to him although I had visited Visa office at California. Mr. Drummond did not reply to my words. Notice that there was no communication difficulty due to my accent during entire phone conversation. The next

day I sent an email to Mr. Drummond to emphasize that I had not met Mr. Washington personally. Mr. Drummond still did not reply.

On May 4, 2009 I filed Amended Complaint (Dkt. no. 29). In the paragraph 35 I claimed I had not met and spoken to Mr. Washington in person. Mr. Washington left Visa on February 9, 2007 and I have still not met him yet. Defendant replied as follow: "VISA asserts that both Plaintiff and Mr. Washington both participated, by telephone, in weekly status meetings and daily morning meetings for the development team." ("Answer to Amended Complaint", Dkt. no. 46, ¶35). That is why the last sentence in this paragraph looks odd: telephone conference meeting was the only occasion that defendant can put Mr. Washington and me together.

I did participate in weekly status meetings via telephone. Project Leads put each team's progress collected from team leads in project status meeting agendas and sent to project members prior to each meeting. Team members did not report work status during the conference. Therefore I did not speak in project status meetings. Most of time I even muted the speaker to prevent noise from entering the phone. Mr. Washington could not hear my accent in weekly status meetings. Defendant realized that it is not convincible that one would complain a co-worker's accent through weekly telephone conferences which more than 20 people participated in. Thus defendant trumped up daily morning meetings so that Mr. Washington could "hear" my accent through telephone every day. I sent Amended RFA 24 (Appendix, 25a) to ask defendant to admit that I had

not participated in daily morning meetings. Defendant denied.

Why did Judge O'Grady believe that Mr. Washington had complained my accent just through telephone conferences in which more than twenty people participated?

Ms Goldman was Mr. Drummond's manager. I did not report my status to her so there was no conversation that Ms Goldman could use to complain my accent.

Mr. David Ward worked from California. I had never made a phone call to him and he had never made a phone call to me.

How could one complain another person's accent without talking to him first? Complaints about my accent were lies, which were controverted in "Response" from page 12-16 and 31-32. Judge O'Grady violated Local Civil Rule 56(B).

Drummond Decl. at ¶ 33:

> "33. ...VISA employees are required to electronically acknowledge receipt of their performance evaluations..."

This is a lie.

Visa HR (Human Resource) sent out an email on December 11, 2006 and unambiguously printed that acknowledge performance reviews was not a required step (Appendix, 35a).

This is an important issue. After I told him that I had never met Mr. Washington Mr. Drummond realized that I did not believe his lie. He formed a plan to terminate my employment. He raised my rating to "Successful Contributor" then started

asking every employee in his group to sign their performance reviews. According to Visa HR signing review is the last step in performance review process, which should be after VIP (bonus and salary raise) communication on November 7, 2006 and bonus distribution on November 22, 2006 (Appendix, 27a). If I had signed my review Mr. Drummond would have claimed that my review had been formally ended. He could have terminated my employment without any issue related to annual performance review. Otherwise I would have complained that Visa terminated my employment because I expressed disagreement about my performance rating. Also, I was the only Listener developer. In order to have a smooth transfer of Listener codes and knowledge he removed me from Listener task and reassigned me to BMC Remedy development. He tried to terminate my employment before November 22, 2006 so he did not have to pay annual bonus to me.

After reassignment of my work I was no longer the only programmer on task so I asked to take two weeks off on November 7, 2006 to take care of my son who was severely sick. On November 8, 2006 Mr. Drummond tried last time to get my signature. He sent an email to request his employees to sign reviews before he communicate bonus information to each of them (Appendix, 31a). Obviously Mr. Drummond changed review process by putting signing reviews before communicating and distribution of VIP. To force every one to sign the review he made it a required step though it was an optional step according to Visa HR.

In May 2009 defendant denied that signing

reviews was the last step in performance review process, denied that signing reviews was not a required step, and denied that Mr. Drummond had changed 2006 performance review process. Defendant even denied that Mr. Drummond had put the final step of signing reviews before communicating bonus information (Appendix, 24a). What a brave liar.

Defendant's purpose of denials is to avoid answering a key question: why did Mr. Drummond change review procedure? Defendant could not provide a reasonable explanation other than terminating my employment. However, on September 21, 2006 defendant wrote following statements in their Reply to Response to Motion re 80 Motion for Summary Judgment:

> "Plaintiff does not explain why he believes this alleged change in procedure, applicable to his entire group, was nevertheless discriminatory towards him personally." (Dkt. no. 84, p9).

In this statement defendant essentially admitted to the court that Mr. Drummond had changed performance review procedure. Judge O'Grady also found that Mr. Drummond had changed review procedure (Appendix, 8a). From denial to admission, defendant actually committed perjury.

This is circumstantial evidence. Initial inference is that the change of review procedure to entire group was just a cover-up for two hidden purposes: retaliate against my disagreement about my rating and prevent Mr. Drummond's lie from being exposed. All group members except me agreed their ratings

and they did not find that Mr. Drummond lied so they were irrelevant to Mr. Drummond's retaliation. I was the only one whom Mr. Drummond wanted to retaliate against. What defendant should have done is to explain why Mr. Drummond changed Visa's review procedure. Failure to do so proves that change of review procedure was trying to terminate my employment.

Mr. Drummond's lie was controverted in "Response" on pages 6, 17 and 32-33. Judge O'Grady found that Mr. Drummond changed review procedure but ignored Mr. Drummond's lie. Judge O'Grady should have asked why Mr. Drummond changed review procedure.

Drummond Decl. at ¶ 14:

> "14. The initial estimate for completion of Listener was four to six weeks. Listener was scheduled to be completed in "Build 1" of the project."

Drummond Decl. at ¶ 36:

> "36. As discussed, Mr. Yao's coding of Listener was originally estimated to take four weeks to complete. However, by November 1, 2006, Mr. Yao still had not completed drafting the source code for Listener. Thus, a task that was scheduled to take four weeks to complete, had taken Mr. Yao four months, and he was still not finished."

Mr. Drummond lies. There was no estimate of four to six weeks to complete Listener. Listener was never scheduled to be completed within build one.

Project status meeting agendas provided a guideline or plan for all development teams on how to divide their development activity within build one: Each team should spend four weeks on coding and use two weeks on testing. Thereafter each team takes whatever they developed and moves to build two. The guideline had nothing to do with completion of Listener. They do not even contain the word "Listener". Like all other tasks Listener was scheduled to go through phases of build one (5/29/06-8/4/06, late changed to 5/29/06-8/18/06), build two (8/21/06-10/31/06) and build three (11/2/06-12/29/06). All software was scheduled to be completed on release into initial production in January 2007. All these dates were listed in VIPER Status Meeting Agendas ("Response", Exhibit 20-23). Specifically for Listener, initial communication interface was implemented in build one, integration with alert source and BMC application was conducted in build two, and remaining functionality was added in build three. Listener could not be completed before its integration to BMC application.

On July 13, 2006 Listener was successfully tested in dev environment and three tickets were created ("Response", Exhibit 24). This indicated that the communication interface was completed for build one, which was eight days earlier than planned. On July 31, 2006 Mr. Yim sent an email to tell me that QA environment was not set up yet ("Response", Exhibit 25). That was why build one was extended two weeks.

As team lead Mr. Yim coordinated with alert server department to identify the alert type to be

integrated. The email ("Response", Exhibit 26) indicates that Mr. Yim started contacting alert server administrators from August 31, 2006. On September 5, 2006 it was decided that the alert type to be integrated was "LCFD is Down". Mr. Yim then sent an email to Ming Ho to start integration immediately, which was in build two.

On October 17, 2006 Mr. Yim replied an email to me. The email confirmed that Alert Manager including Listener was successfully integrated with alert servers and BMC application, which was two weeks earlier than deadline of build two. Mr. Yim let me just continue to monitor the running of Alert Manager for next couple of weeks and move a task of adding a new function of "retrieve the date information" to build three. Mr. Yim used the sentence "so far so good" in his email ("Response", Exhibit 29), an indication of good progress for Listener and Transformer. On November 1, 2006 I started a design to add flood control functionality to listener (Appendix, 30a). Listener code was not delayed.

On March 12, 2007 Mr. Drummond wrote: "The original task estimate for TEC listener code was 4 – 6 weeks, yet it took you until early October, over four months, to complete the code." ("Response", Exhibit 19, p2). At least he admitted that I had completed Listener source code although he lied about the estimate to complete Listener. But in August 2009 he claimed in his declaration that I still did not finish Listener source code on November 1, 2006. Virtually Mr. Drummond just uses his one statement to controvert his another statement. None of Mr.

Drummond's statements is believable because you cannot just pick up one lie over other lies made by a liar. How did Judge O'Grady's resolve the self contradictions among Mr. Drummond's statements?

The content of Drummond Decl. at ¶36 was controverted in "Response" on pages 4-5, 17-18, 20 and 34-35. Judge O'Grady based his Memorandum Opinion on Mr. Drummond's lies, which violated Local Civil Rule 56(B)

> Drummond Decl. at ¶ 40:
>
> "40. On or about November 1, 2006, Mr. Torrise and I, in consultation with Mr. Ward, decided that responsibility for creating the Listener source code should be entirely reassigned to Mr. Yim for completion and correction. Mr. Yim, like Mr. Yao, is native-born Chinese."

According to Mr. Drummond's declaration Listener should have been completed before August 4, 2006. Thus, someone should have informed me of the delay. However, from beginning of build two to November 1, 2006, three months of time, no project manager or team lead talked to me about the delay. Does that sound real? Let us find out what really happened on the reassignment of my task based on evidences. The initial reason given by Mr. Drummond to the sudden change of my task was the tight schedule for development of BMC Remedy application. This reason was reflected in Visa's position statement to EEOC on January 12, 2007: "However, due to the impending implementation deadline for the two new customer service tools, it was necessary for Mr. Drummond to remove Mr. Yao

from the development project to work on the new tool that Mr. Yao had been trained on." ("Response", Exhibit 7, p5). The two new customer service tools were NewScale and BMC Remedy applications. By the way, these two new tools were not completed on October 26. 2006. On November 8, 2006, after deciding reassignment of my work Mr. Drummond wrote following comments in my 2006 performance review: "When assigned technical tasks Jim delivers on time with good quality" ("Response", Exhibit 13, p4). However, on March 12, 2007, Mr. Drummond changed the reason to that I spent four months to complete Listener that was originally estimated for 4 – 6 weeks. In August 2009 Mr. Drummond changed the reason to that I had not even finished the Listener coding. Contradicting reasons given by Mr. Drummond only proved that Mr. Drummond kept lying.

Mr. Drummond must have decided to terminate my employment right after I told him that I had never met Mr. Washington. He reassigned my task to ensure a smooth transfer of both Listener codes and knowledge. In the meantime he raised my performance rating and asked all employees in group to sign their reviews so he could have claimed that his group completed performance review. On November 9, 2006 Mr. Yim asked me how to install Listener (Appendix, 32a) and I taught him. I handed Listener source code over to him in the next day. On November 20, 2006 I filed EEOC charge to protect myself, which stopped the termination of my employment until March 2007.

Defendant's lies regarding removing me from

Listener task were controverted in "Response" on pages 17-18 and 33-34. Judge O'Grady violated Local Civil Rule 56(B).

> Drummond Decl. at ¶ 45:
>
> "45. After responsibility for coding Listener was reassigned to Mr. Yim, he informed me of the extent of the deficiencies in the code Mr. Yao created. The Listener code Mr. Yao wrote was tested by Quality Assurance and found to have many deficiencies, including, but not limited to, memory leaks, high CPU utilization, no flood control, and a lack of functionality to provide return receipts to the sending consoles. Mr. Yim corrected all of these problems. For example, Mr. Yim spent approximately three weeks making major corrections in logic and omission on TEC and PEC Listeners. Thereafter, Mr. Yim worked on other Listeners, Listeners that Mr. Yao should have completed."

Mr. Drummond made four lies in this paragraph. First lie: Mr. Yim fixed memory leak and high CPU utilization. In fact I fixed high CPU utilization bug around October 4, 2006 and memory leak bug around October 11, 2006 (Appendix, 29a). On March 12, 2007 Mr. Yim confirmed in his email that I had fixed memory leak and high CPU utilization and there was no issue on the Listener (Appendix, 36a).

Second lie: Listener handed over to Mr. Yim had no flood control. Build three was planned to be used to add remaining functionalities. Listener's remaining functionalities including flood control would be added in build three. In fact there would be

build four and five for "defect repair and production adjustments" and "possible monitoring scope enhancements" ("Response", Exhibit 22, p4). Since Mr. Yim did not provide flood control design I started working on the design on November 1, 2006 (Appendix, 30a). Mr. Drummond removed me from working on Listener therefore I could not complete the flood control function. Mr. Yim took over the code and implemented the function based on my initial idea. Thus after reassignment of my work adding flood control functionality became Mr. Yim's task.

Third lie: Listener lacked of return receipts to the sending consoles. On November 10, 2006 I handed Listeners to Mr. Yim. I took next two weeks off to take care of my son who was severely ill. I started working on BMC development from November 27, 2006. On November 28, 2006 Ming Ho sent an email to request adding return receipts for PEC Listener (Appendix, 34a). Obviously this should be Mr. Yim's responsibility.

Fourth lie: Mr. Yim worked on other Listeners that Mr. Yao should have completed. After the completion of first listener all other listeners were basically copies of the first listener. Since Mr. Drummond removed me from Listener task, of course it became Mr. Yim's task to create other listeners by copying the first listener.

Mr. Drummond has been trying to discredit my work on Listener. He wrote in his memorandum on March 12, 2007: "ultimately the code was handed over to the consultant in October and a re-write was required prior to release into production" ("Response", Exhibit 19, p2). I compared both Listener codes that I

developed and that released into the production on January 29, 2007. I sent both versions of codes and comparison line by line to Visa Sr. manager Rick Knight on March 25, 2007. The comparison shows that not a single line of my codes was re-written. Once again, Mr. Drummond was proved a liar. But Visa management ignored my comparison and fired me on March 29, 2007.

On June 10, 2009 Mr. Drummond changed his words again and denied that my Listener was released to production on January 29, 2007: "Defendant asserts that listener was not released into production until May 14, 2007." (Appendix, 25a). However, defendant's witness Mr. Yim wrote in April 2007: "Yes, the current TECListener running in production is based on Jim's code" ("Response", Exhibit 34, p13/VISA-0024). Mr. Yim's statement confirmed that the Listener code was running in production when he was writing, which means the Listener code I had developed was already released into the production. In software industry, code that is released into production means the code is completed on time with good quality.

Mr. Drummond changed his own words regarding Listener code in March 2007: "So perhaps I will change the term 're-write' to 'correct and enhance' before fit for production" ("Response", Exhibit 34, p13/VISA-0024). Mr. Drummond is a liar. I fixed the bugs but he wrote that it was corrected by Mr. Yim. My Listener code was running in production but he wrote that it was Mr. Yim's code. When Mr. Yim wrote that it was my code he wrote that Listener was not released into production until

May 2007.

Mr. Drummond's self contradicting statements on this issue are controverted in my "Response" on pages 17-18, 20-24 and 35-37. Then how did Judge O'Grady resolve the self contradictions among defendant's witnesses and concluded that I am "one of an employee who failed to complete his work accurately and on time"? (Appendix, 13a).

Drummond Decl. at ¶ 53:

> "53. Throughout his employment, Mr. Yao experience ongoing attendance issues. There were several occasions when Mr. Yao left work early or came in late without informing his team members where he could be reached. He worked from home without notice. He also often took unscheduled time off without prior authorization. Although Mr. Yao was classified as an exempt employee under the Fair Standards Act, and, therefore, had some discretion in his work schedule and hours, his frequent unscheduled absences put a strain on my Group because his co-workers and I could not count on him to be available to perform his job duties. I frequently counseled him regarding these issues. Despite these counselings, Mr. Yao's attendance problems did not improve and he did not seem to appreciate the need to follow Company policy regarding attendance and leave."

This issue was controverted in "Response" on pages 26-28 and 39-42. Like all his lies Mr. Drummond has no evidence. Mr. Drummond did not

raise any attendance issue before I filed EEOC charge. Mr. Drummond raised my attendance issue as pretext for retaliation after I filed EEOC charge. It was a poor lie that team members could not reach me. I was the only employee in Mr. Drummond's group who worked in east coast. I stayed in office about nine hours every work day, Visa shall have my badge records. I had a company's cell phone that could be reached 24/7 to support legacy service tools. I was called frequently during weekends for resolving legacy service production exceptions. I did not work from home except that production exceptions escalated to me during weekends.

Drummond Decl. at ¶ 68:

"On Monday, March 12, at 3 p.m. E.S.T., Ms. Light and I met with Mr. Yao to deliver the PIP. Mr. Yao and Ms. Light were in the same room in OCE and I was on the phone from California. During the meeting, Mr. Yao spoke to me in a disrespectful and unprofessional manner. Mr. Yao yelled at me and would not listen to the feedback that I provided...Mr. Yao's rude and insubordinate behavior continued throughout the entire one hour conversation."

Light Decl. at ¶ 18:

"...Tracy Drummond was on the phone from California. Yao and I were in the same room in Mclean, Virginia. During that call, I observed that Yao spoke to Mr. Drummond in a disrespectful and unprofessional manner. Yao yelled at Mr. Drummond and

> would not listen to the feedback that Mr. Drummond provided. Specifically, Yao debated each and every point made by Mr. Drummond about his performance and he outright rejected the performance improvement plan. Yao's rude and insubordinate behavior continued throughout the entire one hour conversation..."

Obviously, Ms. Light's statements are firsthand observation since she was in the same room with me. Why did not Judge O'Grady use her paragraph? The answer is that Ms. Light was proved a liar in the court hearing on September 25, 2009. Judge O'Grady should have rejected all declarations from defendant. But he just avoided using her declaration so he could keep other four declarations. However, using Mr. Drummond Decl. at 68 is indirect use of a liar's statement. How can anyone believe that I yelled to a phone for entire one hour? So how did Mr. Drummond finish his speech? Ms. Light and Mr. Drummond made a poor lie.

Mr. Drummond delivered the PIP to me on March 12, 2007. But the PIP started from March 4, 2007 ("Response", Exhibit 19, p5). The installation of PIP did not even follow normal procedure. This was one of the reasons that I rejected the PIP. These paragraphs are controverted in "Response" on pages 10-11, 29-30 and 43.

I do not list paragraphs in other three declarations. Yim Decl. and Torrise Decl. just repeat Drummond Decl. Ms. Goldman uses sentences "I was informed...", "I understand...", "Mr. Drummond and

others brought to my attention...", "Ms. Light verbally reported to me...", "According to Ms. Light", "Ms. Light reported to me". None was her firsthand experience. How could Judge O'Grady use such unreliable statements as facts for his judgment?

REASONS FOR GRANTING THE PETITION

This case presents the most fundamental jurisdictional question since the first court was established in human history: should a Judge be allowed to use lies to support his judgments? Some critical legal procedures and rules were violated in this case. It is a judicial failure that this appeal has to come to the Supreme Court.

I. No Oral Argument held on Genuine Issues Related to My Complaints

I identified 34 facts in dispute in my "Response" ("Response", p3-11). Only the first two went through the oral argument in the court hearing on September 25, 2009. These two facts in dispute involve the issue whether Visa Inc. is right defendant. This issue was created by defendant. It is irrelevant to genuine issues regarding discrimination and retaliation in this case. After this issue was determined I challenged the veracity of another witness's declaration, then Judge O'Grady stopped the oral argument. The rest of 32 facts in dispute about discrimination and retaliation happened in 2006-2007 were unheard by Judge. In other words, real issues related to my complaints such as accent discrimination, BMC training, Listener delay, Mr. Drummond's lies, attendance, retaliation, etc. were not orally argued in court. Judge O'Grady made

judgment only based on written documents although he used following words such as "argues" (Appendix, 10a and 17a) and "persuaded" (Appendix, 11a). None of these activities verbatim happened in the court.

There are big differences between written documents and oral argument. When each party writes legal statements he follows his own memory, understanding and perception. Different parties can write totally different or partially different statements on the same fact. Due to the vague and ambiguous nature of languages one statement can be interpreted differently by different people. If someone plays trick it will add more confusions to the statement. Oral argument can overcome lots of these drawbacks. When two parties face to each other with Judge in the same room, they can quickly exclude irrelevant parts and focus on the relevant details. More accurate expressions of facts can be found. Both parties can easily bring in more evidences if the initial evidences are not persuasive enough. Impeachment can be made right away. This is the most effective way to ensure fairness and justice because every party has the opportunity to express their opinions till the true facts are found. When Judge makes a judgment based on written statements, the opposing party has no opportunity to present new evidence to change Judge's inclination or misunderstanding before the judgment is made. That is why the oral argument is the most critical procedure in legal trial. It leaves the least room for biased and partial judgments.

When the first fact in dispute began arguing on September 25, 2009, Judge O'Grady intended to drop

Visa Inc. as defendant based on his reading both parties' written documents. After I presented evidence he ruled that Visa Inc. remained as defendant. As a result the declaration of Michelle Light was virtually rejected because her declaration contains lies. This is an example that how oral argument can change ruling that is just based on written statements.

Unfortunately, after I won the first issue, Judge O'Grady stopped the oral argument and never resumed it. As a result Judge O'Grady failed to find the true facts and made judgment only based on defendant's version of facts. The paragraphs he referred to in his Memorandum Opinion were all in dispute but none of them went to oral argument. That resulted in that his judgments were based on lies. Allow me to present one example. One of the most critical issues in this case is the time frame to complete Listener source code. Mr. Drummond claims that I spent four months to work on the Listener coding that original estimate was 4 – 6 weeks to complete. I deny the existence of such an estimate. Since I did not have direct evidence for something that never existed I tried to prove that estimate of 4 – 6 weeks was not realistic by showing daily progress during development of Listener to Jury. If I can prove the estimate is not realistic then I also prove that no one would make such unrealistic estimate. From June to October of 2006 Mr. Yim and I sent emails each other almost daily regarding development of Listener and Transformer. I selected more than 20 emails and provided to defendant in May and July of 2009. In his declaration on August 25, 2009 Mr. Drummond first time mentioned that

the 4 – 6 weeks estimate was in RICPM Status Meeting Agenda for May 18, 2006 (Drummond Decl ¶15). I looked at that agenda and could not find the estimate of 4 – 6 weeks to complete Listener. I did text search for "Listener". The agenda does not even contain the word "Listener" so I kept my previous proof strategy and identified defendant's statement as disagreement on page 4 of "Response":

> "Defendant: The May 18, 2006 agenda, which Mr. Yao received, indicates that the source code for Listener was estimated to take four weeks, beginning June 26, and that testing and correction of the code was estimated to take up to another two weeks.
>
> Dispute: The estimate was not realistic. (IV. UNDISPUTED MATERIAL FACTS, ¶14, ¶15)."

Defendant wrote late that I dispute "the reasonableness of that estimate three and half years later" (Dkt. no. 84, p3). Defendant knows that my statement controverts their statement. However, while preparing this petition I occasionally found two lines of text about four (4) weeks of development and two (2) weeks of QA testing in that agenda. I understood immediately how Mr. Drummond made this lie. The two lines of text do not provide any estimate, explicitly or implicitly, for completion of Listener within 4 – 6 weeks. The text does not even contain the word "Listener". They were guideline or plan for all project development teams on how to divide their work in build one. That means every development and integration task should spend four

weeks on coding and use two weeks on testing. Then take whatever they developed and move to build two. Build three was used to add remaining functionality. All software was scheduled to be completed on release into production on January 29, 2007. If Mr. Drummond had pointed to these two lines of text and claimed they were the estimate of 4 - 6 weeks to complete Listener I would have proved immediately in the court that this is a lie. I have presented evidence that I completed initial source code of Listener on or before July 13, 2006, which was eight days ahead of plan. I have presented evidence that up to July 31, 2006 QA was still not ready for testing. That was why the build one was extended two weeks. I have presented evidence that Listener completed integration on October 17, 2006, which was two weeks ahead of deadline. I have presented evidence that Mr. Drummond praised me for delivering code on time with good quality for year 2006. All these evidences logically fit what actually happened along the time. With his new lies Mr. Drummond cannot explain why he wrote comments that I delivered code on time with good quality after he removed me from Listener development due to delay of Listener. Mr. Drummond would have been found lying about delay of Listener in the court. Then, his next statement, removing me from Listener development due to delay, would have been automatically found lying. Then the next, the performance improvement plan would be proved baseless. Then the next...it would have been a disaster for defendant. Judge O'Grady has many years of trial experience. When he saw that I was competent to testify he stopped the oral argument to prevent defendant's disaster. It is double

bankruptcies for both jurisdiction and morality.

A liar tells Judge that a shepherd steals a calf from him and hides the calf in his flock of sheep. The shepherd tells Judge that there is no calf in his flock of sheep. The liar draws a picture of calf and sends the picture to court. Judge orders that liar take his calf back before the shepherd asks the liar to finger point the calf in his flock of sheep. The liar takes the biggest sheep from shepherd and leaves.

Oral argument is indispensable.

II. District Judge Violated Local Civil Rule 56(B)

When judging based on written documents Judge O'Grady violated Local Civil Rule 56(B).

I signed my "Response" under penalty of perjury so it is a legitimate opposing affidavit. The facts in dispute were presented in "Response" as pairs of statements in chapter II. For example, the first fact in dispute was listed on page 3 of "Response" as following pair:

> "Defendant: VISA Inc. does not employee any individuals.
>
> Dispute: VISA Inc. employs individuals. (IV. UNDISPUTED MATERIAL FACTS, ¶2)."

The first one labeled as "Defendant" is identified defendant's statements that I disagree. The second one labeled as "Dispute" is my statement that I use to dispute against defendant, which is admissible fact if it is proved to be true. Parenthesis refers to the undisputed facts in chapter IV. The chapter III offers my version of facts.

When court hearing started on September 25,

2009, Judge O'Grady denied defendant's motion to strike excessive pages of my "Response", which recognized that my "Response" is a legitimate opposing affidavit.

The oral argument went on to the first fact in dispute. I disputed defendant's statement using my version of facts and undisputed facts at ¶2 of chapter IV, along with a printed news line reporting that Visa Inc. employs individuals as evidence attached to "Response" as Exhibit 3. Judge O'Grady thus denied defendant's motion to remove Visa Inc. from defendant. I won the issue so the statement labeled as "Dispute:" is the true admitted fact, which also shows that I am competent to testify on the matters stated in my "Response". However, before going to real issues in this case the oral argument was stopped by Judge O'Grady.

As demonstrated in prior sections all paragraphs that Judge O'Grady's Memorandum Opinion depends on are identified for disagreement and my version of facts are presented in "Response". For example, at ¶20 of his declaration Mr. Drummond claims that "*Mr. Yao chose not take the BMC training offered in June.*" I have following pair of statements on page 5 of "Response":

> "Defendant: Mr. Yao chose not to take the requested training in the summer of 2006.
>
> Dispute: Mr. Drummond created false evidence and sent it to EEOC. Plaintiff completed all BMC training. He was going to take remote NewScale training. (IV. UNDISPUTED MATERIAL FACTS, ¶ 30, ¶ 31)."

The statement that "Plaintiff completed all BMC training" controverts defendant's statement. As referred at ¶31 of chapter IV I present the undisputed fact that I (plaintiff) traveled to California to attend BMC Essential and Admin 2 trainings from 6/5/2006 to 6/17/2006 ("Response", p39). The travel expense report is attached as Exhibit 44. If Judge O'Grady read my version of facts at Chapter III he should find that on page 25, there is a section (11. BMC training) covering all issues related to BMC training. According to Local Civil Rule 56(B), Judge O'Grady cannot admit Drummond Decl ¶20 as a fact. Nevertheless Judge O'Grady disregarded the rule and based his judgment on Drummond Decl ¶20. But Drummond Decl ¶20 is a lie. Judge O'Grady violated this rule in every paragraph he referred to in his Memorandum Opinion.

III. Proof of Lies in Drummond Declaration

I have attached 57 exhibits to my "Response" as evidences. Due to lack of legal knowledge I did not attach a sworn or certified copy to each exhibit as required by Fed. R. Civ. P. (56)(e)(1). However, defendant did not attach a sworn or certified copy to each of Exhibits attached to Mr. Drummond's declaration either. If Judge O'Grady ignored my evidences because they were not sworn copies then how did he find the evidence of estimate of 4 – 6 weeks to complete Listener in Mr. Drummond's attached exhibits that were not sworn either?

I have provided evidences that sufficiently prove that paragraphs that Judge O'Grady's Memorandum Opinion is based on contain lies and false statements.

Original copies for all evidences mentioned in this petition are ready to submit.

All legal procedures and rules are made to ensure that legal judgments are based on true facts. Judges should not issue orders that use lies as supporting facts. If an order is found based on lies, even just one, the order must be voided or canceled. Judge O'Grady's Memorandum Opinion is mainly based on Mr. Drummond's lies so it must be voided.

CONCLUSION

The petition for writ of certiorari should be granted.

The oral argument that was taken away by Judge O'Grady has to be resumed. At least the paragraphs referred to in Memorandum Opinion by Judge O'Grady need go through oral argument in the court. Witnesses who provided declarations must come to the court to go through cross examination for perjury purpose.

Respectfully submitted,
Xiaoping Yao
Pro se
21476 Rusty Blackhaw Sq
Sterling, VA 20164
(703) 433-9072

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Case No. 09-2342 (1:08-cv-01181-LO-TCB)

FILED: April 20, 2010

XIAOPING YAO,

Plaintiff - Appellant,

- v. -

VISA INCORPORATED,

Defendant - Appellee.

O R D E R

The Court denies the petition for rehearing and rehearing en banc and the motions to supplement the record. The Court further denies as moot the motion to reconsider the denial of the motion to extend the time for filing petition for rehearing and rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Motz and Judge Davis.

For the Court
/s/ Patricia S. Connor, Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Case No. 09-2342 FILED: March 19, 2010

XIAOPING YAO,

Plaintiff - Appellant,

- v. -

VISA INCORPORATED,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, District Judge. (1:08-cv-01181-LO-TCB)

Submitted: March 16, 2010 Decided: March 19, 2010

Before NIEMEYER, MOTZ, and DAVIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Xiaoping Yao, Appellant Pro Se. Katherine Anne Goetzl, Lindsey Hager McGinnis, LITTLER MENDELSON, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Xiaoping Yao appeals the district court's order

granting summary judgment in favor of his former employer, Visa Inc., and dismissing his claim pursuant to 42 U.S.C. §§ 2000e-2000e-17 (2006). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Yao v. Visa Inc., No. 1:08-cv-01181-LO-TCB (E.D. Va. Nov. 6, 2009) We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Case No. 09-2342 (1:08-cv-01181-LO-TCB)

FILED: March 19, 2010

XIAOPING YAO,

Plaintiff - Appellant,

- v. -

VISA INCORPORATED,

Defendant - Appellee.

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

XIAOPING YAO,	)	
Plaintiff,	)	Civil Action No.
v.	)	1:08-cv-1181
	)	(Filed NOV. 6, 2009)
VISA, INC., et al.,	)	
Defendant.	)	

ORDER

This matter comes before the Court on the Defendants' Motion for Summary Judgment (Dkt. no. 80). For the reasons that follow in the accompanying memorandum opinion, it is hereby

ORDERED that Defendants' Motion for Summary Judgment (Dkt. no. 80) is GRANTED pursuant to Fed. R. Civ. P. 56(c) and this is DISMISSED WITH PREJUDICE.

Alexandria, Virginia
November 6, 2009

/s/ Liam O'Grady

Liam O'Grady
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

XIAOPING YAO,	)	
Plaintiff,	)	Civil Action No.
v.	)	1:08-cv-1181
	)	(Filed NOV. 5, 2009)
VISA, INC., et al.,	)	
Defendant.	)	

Memorandum Opinion

Inovant LLC ("Inovant"), a subsidiary of Visa, Inc., [1] employed Xiaoping Yao ("Yao"), who is of Chinese national origin, as a software engineer. Yao filed an initial discrimination charge with the EEOC on November 20, 2006 while still employed by Visa. Yao then filed an amended charge with the EEOC on April 6, 2007 after being terminated by Visa in

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[1] Defendant VISA, Inc. asserts that Plaintiff was actually an employee at all relevant times of Inovant LLC, which is a wholly-owned subsidiary of VISA, Inc. In turn, VISA USA, Inc. is a wholly-owned subsidiary of VISA, Inc. In 2006, VISA USA merged into VISA, Inc. as apart of initial IPO restructuring before VISA decided to take some of its constituent companies public, but VISA USA remains a separately incorporated entity. For ease, Yao's employer will simply be referred to as "Visa" for the remainder of this memorandum opinion. The identity of the correct defendant to this action was the source of some dispute during oral argument on September 25, 2009. Defense subsequently counsel agreed to amend the pleadings to name all three entities as defendants.

March of 2007. The EEOC issued a Dismissal and Notice of Rights on August 27, 2008. Yao then filed his Complaint in the present action on November 12, 2008 and Visa filed its Answer on February 19, 2009.

I. Background

The following facts are undisputed. Yao began working for Inovant in August of 2005 in its McLean, Virginia office. Yao's direct supervisor was Mr. Tracy Drummond, who managed Yao remotely from the company's San Francisco office. In the Spring of 2006, Visa placed Yao on a project to write source code for a program called "Listener" which was part of a larger project named "VIPER." In August of 2006, Yao was scheduled to travel to California for planned training on another of the subordinate VIPER programs named "NewScale." Yao failed to do so. Later, in September of 2006, Visa asked Yao to take classes to improve his English pronunciation, which he eventually took, but declined VISA's offer to pay for the classes and instead paid for them himself. Yao initially received a low performance rating in 2006, but Mr. Drummond subsequently upgraded that rating. Mr. Drummond, then changed the "performance review acknowledgement" procedure for the entire group in which Yao worked.

In November of 2006, Yao was reassigned from the "Listener" project to a project called "BMC Remedy." Yao's share of responsibility for the "Listener" project was transferred to another employee of Chinese national origin, Mr. Kin Yim. Shortly thereafter, Yao requested, and was granted, two weeks of leave. While on leave Yao filed his

initial EEOC Charge on November 20, 2006. Yao missed work on January 21, 2007 without prior approval. In February 2007, Yao submitted an expense report which included a $42 "snack." Mr. Drummond changed the expense reimbursement policy and corporate card usage practices for Yao's group.

VISA attempted to place Yao on a "performance improvement plan," and Yao took two weeks of FMLA leave shortly after being presented with the plan. Visa terminated Yao's employment of March 29, 2007.

II. Jurisdiction and Venue

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this cause of action arises under federal law. Venue is proper in this case under 42 U.S.C.A. § 2000e-5(f)(3) as this Court sits in Virginia, the state in which the unlawful employment practice is alleged to have been committed.

III. Legal Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that a motion for summary judgment will be granted if it is shown that no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Cellotex Corp. v. Catrett*, 477 U.S. 317, 322-324 (1986). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v.*

Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party is entitled to judgment as a matter of law unless a fair-minded jury could return a verdict for the nonmoving party on the evidence presented. *Id.* at 247-48.

IV. Analysis

Under Title VII of the Civil Rights Act of 1964, it is unlawful for an employer to "discharge or otherwise discriminate against an individual with respect to his...national origin." 42 U.S.C. § 2000e-2(a)(1). Yao, proceeding *pro se*, alleges that Visa took discriminatory action against him and ultimately terminated his employment because of his national origin and in retaliation for filing the November 2006 Charge with the EEOC. The Court has endeavored to parse out and give full consideration to Yao's many allegations. Having done so, the Court concludes that Yao's allegations are without merit.

a. Yao Fails to Establish a Prima Facie Case of Disparate Treatment Under Title VII.

Yao alleges that Visa discriminated against him due to his national origin. Because Yao fails to present any direct evidence of discrimination, the well-established *McDonnell-Douglas* framework is applicable. 411 U.S. 792 (1973). The four *McDonnell-Douglas* factors of a disparate treatment claim are: (1) that the plaintiff is a member of a protected class; (2)

that the plaintiff suffered an adverse employment action; (3) that at the time of the discrimination, the plaintiff was performing to his employer's expectations; and (4) that other similarly-situated employees who are not members of the protected class were treated differently. *Id.* Under this framework, Yao bears the initial burden of establishing a prima facie case of discrimination. If Yao successfully establishes the four factors, the burden shifts to Visa to offer legitimate, nondiscriminatory reasons for its actions. *Id.* If Visa does so, the Yao must present evidence to prove that the defendant's expressed reasons were a pretext for unlawful discrimination. *Id.*

Yao is undoubtedly a member of a protected class, and thus the first of the four initial *McDonnell-Douglas* factors in establishing a *prima facie* case is met. However, Visa argues that the remaining three elements are not met here.

1. Adverse employment action.

VISA argues that none of the actions alleged by Yao constitute "adverse employment actions" under the *McDonnell-Douglas* test. Usually, "discharge, demotion, decrease in pay or benefits, loss of job title or supervisory responsibility, or reduced opportunities for promotion" are the "typical requirements for a showing of an 'adverse employment action' that can support a Title VII claim." *Boone v. Goldin*, 178 F.3d 253, 255-256 (4th Cir. 1999). This Circuit has observed that "inquiries into adverse employment actions have consistently focused on whether there has been discrimination in

such ultimate decisions as hiring, granting leave, discharging, promoting, and compensation." *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.1981). While the Supreme Court has indicated that the catalog of acts which would violate Title VII is more generous than such a finite list, *e.g.*, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2268, 141 L.Ed.2d 633 (1998), the Court has been equally clear that Title VII is not meant to address every slight or inconvenience in the workplace. *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998).

Accordingly, the Court is persuaded that none of the following rise to the level of an "adverse employment action" as contemplated in the context of Title VII: asking Yao to take pronunciation classes; changing the "performance review acknowledgment procedure;" reassigning Yao from the "Listener" coding project to "BMC Remedy" project;[2] or receiving a lower initial performance rating which was subsequently raised.[3] Though Yao may have felt inconvenienced, put off, or otherwise offended by

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[2] Though a reassignment, when coupled with a sufficiently marked decrease in quality of work conditions, may constitute an "adverse employment action," see Boone, 178 F.3d at 255, nothing in Yao's allegations legitimately indicates to the Court that the reassignment was anything other than VISA moving an employee from one project to another. The reassignment did not result in a decline in working conditions or a decrease in compensation for Yao. Thus, on the record before the Court, the reassignment did not qualify as an "adverse employment action."

[3] Following the performance review, Yao was given a raise and a year-end bonus, so it is difficult to maintain that he suffered an "adverse action" as contemplated under title VII.

these actions, none present a negative impact on his employment with sufficient gravity to give rise to a violation of Title VII.

However, Yao's termination certainly suffices as an "adverse employment action" as contemplated by the Title VII framework. See *Boone*, 178 F.3d at 255. Likewise, Yao's termination likely suffices to meet the fourth *McDonnell-Douglas* factor, whether Yao was treated differently than similarly situated individuals outside his protected class, as other programmers outside Yao's protected class were not simultaneously terminated. Therefore, the Court focuses its attention on the remaining third factor of the *McDonnell- Douglas* frame work, whether Yao was performing to Visa's expectations at the time of the alleged discrimination.

2. At the time of the alleged discrimination, Yao was not performing to his employer's expectations.

Though Yao meets the second *McDonnell* factor by alleging a discriminatory termination, evidence in the record demonstrates that Yao's performance was deficient prior to his termination. Yao disputes that his performance was inadequate, but only by his own self-serving claims and speculations, which, standing alone, "cannot create a genuine issue of material fact." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). On the other hand, Visa offers a mass of evidence indicating Yao's shortcomings as an employee.

In his declaration, Tracy Drummond, a Senior Enterprise Architect at Visa and Yao's direct

supervisor, chronicles the instances in which he was informed of other employees having difficulty understanding Yao, Yao's attendance problems, Yao's failure to attend mandatory training, and Yao's general insubordination. Drummond Decl. at ¶20-28, 36, 37, 40, 45-48, 68. Further, the declaration of Karla Goldman, the Senior Business Leader of the Process Management team at Visa, attests to having told Mr. Drummond that she had difficulty understanding Yao when he spoke, that she had been informed by others in the workplace of similar difficulties, that Yao exhibited "performance issues" on the job, and that Yao rejected the suggested performance improvement plan. Goldman Decl. at ¶8-16. Lastly, the declaration of Jim Torrise, a Senior Project Manager for Visa, states that there were "qualitative issues" with Yao's coding, that Yao was late in completing his portion of the "Listener" project and that the project was reassigned to another engineer. Torrise Decl. at ¶ 9-10.

Even straining to construe Yao's declarations, as a *pro se* plaintiff, in a beneficial light, Yao's on-the-job shortcomings are apparent from the record before the Court. The picture that emerges from the declarations of those who supervised and worked with Yao at Visa is one of an employee who failed to complete his work accurately and on time, was recalcitrant when asked to attend training and improve his communication skills, and rejected a suggested performance improvement plan. As such, the Court finds that the third *McDonnell-Douglas* factor is not met in this case, which is fatal to Yao's claim for disparate treatment under Title VII. For the sake of thoroughness, however, the Court also

notes that Yao fails in overcoming his ultimate burden of showing pretext even if a *prima facie* case is present.

3. Even if a prima facie case is established, VISA asserts legitimate, nondiscriminatory reasons for its actions and Yao cannot demonstrate that these actions are pretext for discrimination.

Even if Yao presented a prima facie case of discrimination based on national origin, Visa offers legitimate, nondiscriminatory reasons for its actions. *McDonnell-Douglas*, 411 U.S. 792. It does so by pointing to: Yao's weak language skills; lack of and failure to get proper training; deficient and delayed work on the Listener program; and insubordination by refusing the performance improvement plan.

Given that Visa amply meets its burden to offer a nondiscriminatory grounds for its actions, Yao must show that these grounds are merely pretext for discrimination. In explaining a Title VII plaintiff's burden of proof on the issue of pretext, the Supreme Court has recognized that:

> an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

On this point, the applicable analysis under the second factor of the *McDonnell-Douglas* framework – whether Yao met Visa's expectations – is equally illustrative on this point. *See* § IV.A.2., *supra*. On repeated occasions, Yao had difficulty communicating with coworkers, performed deficiently in his programming, and was insubordinate when offered an opportunity to improve his performance by Visa. Perhaps most telling is that when Yao was transferred from the RICPM/VIPER "Listener" project, Visa reassigned the project to another employee of the same national origin, Kin Yim. Decl. of Kin Yim at ¶ 19. Thus, the Court finds Visa's explanations of the adverse actions to be legitimate and devoid of any discriminatory pretext.

ii. Yao Fails to Establish a Prima Facie Case of Retaliation Under Title VII

Yao next alleges that he was subjected to retaliation for filing a discrimination charge with the EEOC in November 2006 when: (1) he was "counseled" to taking an unscheduled absence in January 2007; (2) Mr. Drummond changed the expense policy for his entire group; (3) he was placed on a performance improvement plan; and (4) he was terminated. In order to maintain a claim under Title VII, Yao must also meet the *McDonnell-Douglas* burden-shifting framework to make out a *prima facie* case of retaliation. To establish a *prima facie* claim, Yao must demonstrate that: (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) a causal connection

exists between the protected activity and the adverse employment action. *See Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253, 258 (4th Cir. 1998); *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 406 (4th Cir. 2005). If Yao establishes these three factors, Visa then bears the burden of articulating a non-retaliatory reason for its adverse action. *Id.* If Visa does so, the presumption raised by Yao's establishment of a *prima facie* case "drops from the case," such that Yao then bears the ultimate burden of proving he is the victim of retaliation. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

VISA concedes that Yao's filing of a complaint with the EEOC is a protected activity, but disputes that Yao established any of the remaining elements of a retaliation claim.

1. Yao suffered an adverse employment action.

As the Supreme Court instructs, in order to establish an "adverse" retaliatory employment action, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)(internal citations omitted). *See also Wells v. Gates*, 2009 WL 1991212, 3 (4th Cir. 2009).

The Court agrees with Visa that most of the actions alleged by Yao do not qualify as an "adverse employment action" for the purposes of a Title VII retaliation claim. For instance, Visa's change in

travel expense policy was not an adverse employment action. Likewise, Visa placing Yao on a performance improvement plan was not an adverse employment action. *See, e.g., Haynes v. Level 3 Commun., LLC*, 456 F.3d 1215, 1224 (10th Cir. 2006); *Givens v.Cingular Wireless*, 396 F.3d 998, 998 (8th Cir. 2005); *Taylor v. Small*, 350 F.3d 1286,1293 (D.C. Cir. 2003). Again, whatever inconvenience Yao might have drawn from these actions, the focus under Title VII is one "of *material* adversity" because "it is important to separate significant from trivial harms." *Burlington Northern and Santa Fe Ry. Co.*, 548 U.S. at 68 (internal citations omitted).

However, as Visa concedes, "counseling" Yao about his taking an unscheduled day off and terminating his employment constitute adverse employment actions. Nonetheless, Yao must still meet the third *McDonnell-Douglas* factor by demonstrating a causal connection between Yao's EEOC complaint and these adverse actions.

2. No causal connection exists between the protected activity and the adverse employment action.

Yao argues that Visa "counseled" him and ultimately terminated him in retaliation for his filling of a charge before the EEOC in 2006. As noted above, Yao must demonstrate a nexus between these adverse acts and the protected activity, his filing of the EEOC charge.

Yao offers no causal tie between the "counseling" he received after missing work on January 19, 2007 and his 2006 EEOC. There was a two month gap

between filing the charge and the "counseling." Sometimes, a "causal connection may be shown by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Haynes v. Level 3 Communications, LLC*, 456 F.3d 1215, 1228 (10th Cir. 2006) (citing *O'Neal v Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001).

Visa cites *King v. Rumsfeld*, 328 F.3d 145, 151 n. 5 (4th Cir. 2003), cert den., 540 US 1073 (2003), for the proposition that a lapse of two months between a protected activity and an adverse employment action is "sufficiently long so as to weaken significantly the inference of causation." *Id.* In that case, however, the Fourth Circuit went on to say "[y]et, in the context of *this particular* employment situation, this length of time does not undercut the inference of causation enough to render [the plaintiff]'s prima facie claim unsuccessful." *Id.* (emphasis added).

Nevertheless, when this two month gap is coupled with other evidence, such as the declaration of Yao's supervisor, Tracy Drummond, that Yao had been counseled on a number of occasions throughout his employment regarding attendance issues, there is little on which this Court can infer a connection between the EEOC charge and the attendance counseling. Drummond Decl. ¶ 53. Rather, Visa's counseling of Yao after his unscheduled absence on January 19, 2007, nearly two months after filing his EEOC Charge simply does not suggest any retaliatory animus within the context of the evidence before the Court.

Yao also offers little in the way of a causal

connection between the EEOC Charge and his termination. Yao seems to point to Visa's offer of a severance package in exchange for a release of claims, including his November 20, 2006 EEOC Charge, as indicative of a retaliatory motive behind his termination. The Court finds, however, that Visa's offer of a severance package in exchange for a release of claims does not suggest retaliatory intent and is wholly insufficient as a basis upon which to infer a causal connection between the November EEOC charge and Yao's termination four months later. Rather, seeking a release of claims upon offering a severance package is more accurately viewed as standard business practice, offered for a multitude of good reasons, not the least of which is saving the cost of defending against potentially frivolous suits.

As such, Yao fails to make out a prima facie case of retaliation under Title VII. As this Circuit stresses "[w]orkers are shielded from retaliation on account of their assertion of rights protected under Title VII. But a complaining worker is not thereby insulated from the consequences of insubordination or poor performance." *Ziskie v. Mineta*, 547 F.3d 220, 229 (4th Cir.2008). Here, there is a glaring lack of evidence of a causal connection between Yao's 2006 EEOC Charge and any adverse employment action. There is, however, ample evidence of Yao's insubordination and poor performance on the job.

3. Even if any of Yao's allegations pass these three factors, VISA offers legitimate, nondiscriminatory reasons for its actions which Yao fails to rebut.

Even if a causal tie is inferred for both the

"counseling" due to Yao's absences and his termination, Visa ably meets its burden in offering non-retaliatory, non-pretextual reasons for the adverse actions against Yao.

Regarding the attendance "counseling," Visa's evidence indicates that Yao's attendance was an ongoing problem, addressed by his superiors for non-discriminatory motivations. *See Stukes v. Aetna Insulated Wire Co.*, 145 F.3d 1326 (Table 1998), WL 258379 at *1 (4th Cir. 1998); *Afande v. National Lutheran Home for the Aged*, 69 F.3d 532 (Table), 1995 WL 642835 at* 1 (4th Cir. 1995). As legitimate, non-discriminatory grounds for Yao's termination, Visa offers his insubordination in rejecting the performance improvement plan on three occasions. In fact, Yao admits he repeatedly rejected the performance improvement plan. (Pl. Dep. At 133-34, 137, 141-44; Pl. Compl., ¶ 101). Rather, Yao argues with whether the improvement plan was warranted, an indication to the Court that Yao was indeed insubordinate and unwilling to abide by the suggestions of his superiors as to how he could improve his on-the-job performance. That he was potentially disrespectful in doing so only bolsters Visa's position that Yao was a difficult employee, not performing to expectations, and this, not retaliating against his filing of an EEOC Charge, was the motivating factor behind his termination. This deficiency and insubordination constitute legitimate, non-discriminatory reasons for Visa's adverse actions, and Yao fails to rebut them.

V. Conclusion

For the foregoing reasons, it is hereby ORDERED that Defendant Visa's Motion for Summary Judgment is GRANTED. An appropriate order shall issue.

Alexandria, Virginia
November 5, 2009

/s/ Liam O'Grady
Liam O'Grady
United States District Judge

Expense Report ER151304 (Partial)

Employee Name: Yao, Jim

Total Expenses: $3,665.37

Date	Daily Totals	
05/23/2006	$647.60	Purchase Airfare
06/05/2006	$171.39	
06/06/2006	$186.70	
06/07/2006	$158.12	
06/08/2006	$174.64	
06/09/2006	$190.76	
06/10/2006	$220.20	
06/11/2006	$232.49	
06/12/2006	$179.77	
06/13/2006	$207.32	
06/14/2006	$196.92	
06/15/2006	$178.80	
06/16/2006	$278.60	
06/17/2006	$642.06	

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the Foregoing reprinted expense report (partial) extracted from Expense Report ER151304 is true and correct to the best of my knowledge.

Date: June 23, 2010 /s/ Xiaoping Yao

bmcsoftware
Jim Yao

CERTIFICATE OF COMPLETION
AR System 7.x: Administering – Part 2

bmcsoftware
business school

/s/ Rhonda Ersland

Rhonda Ersland – Education Coordinator
June 16, 2006

Defendant's Responses to Plaintiff's Request For Admissions (selections)

Request for Admission No. 20:

Plaintiff requests an admission from defendant that electronic signature for performance review was the final step.

RESPONSE:

Defendant denies Plaintiff's Request for Admission No. 20.

Request for Admission No. 21:

Plaintiff requests an admission from defendant that electronic signature for performance review was not a required step.

RESPONSE:

Defendant denies Plaintiff's Request for Admission No. 21.

Request for Admission No. 22:

Plaintiff requests an admission from defendant that Mr. Drummond did not follow the standard 2006 year-end performance management process.

RESPONSE:

Defendant denies Plaintiff's Request for Admission No. 22.

Request for Admission No. 44:

Plaintiff requests an admission from defendant that Mr. Drummond put the final step that was

electronic acknowledgement before communicating salary change and bonus information to plaintiff during 2006 annual performance review.

RESPONSE:

Defendant denies Plaintiff's Request for Admission No. 44.

Amended Request for Admission No. 10:

Admit that the TEC listener and PEC listener dated on 11/10/2006 was developed by plaintiff and the TEC listener and PEC listener dated on 1/29/2007 were released to production on 1/29/2007 by Kin Yim.

RESPONSE:

Defendant admits that the listeners dated 11/10/2006 were developed by Plaintiff. Defendant asserts that listener was not released into production until May 14, 2007. Defendant otherwise denies Plaintiff's Amended Request for Admission No. 10.

Amended Request for Admission No. 24:

Admit that plaintiff was never informed of any daily morning status meeting so he never attended such meetings while worked at Visa.

RESPONSE:

Defendant denies Plaintiff's Amended Request for Admission No. 24.

From: Visa HR
Sent: Tuesday, September 05, 2006 5:21 PM
Subject: Start of Year-End Review Process

To: All Visa USA and Inovant Employees
From: Susanne Lyons, EVP, Human Resources
Date: September 5, 2006
Re: Start of Year-End Review Process

Over the next few weeks, you will be providing input to your manager for your FY06 performance review through a self assessment available in the Visa Performance Management (VPM) system. With this as input, your manager will write your final review, recommend your performance rating, and submit recommendations for your FY07 salary and FY06 VIP payout.

Common Review provides another opportunity for you and your manager to discuss your accomplishments in FY06 and development opportunities for continued growth.

Review of Performance Management Changes
At mid-year, we introduced several changes to our performance management and VIP programs to reinforce the link between performance and rewards. These changes include:

New Rating Labels and Definitions (updated since Mid-Year)
To support better differentiation of performance and rewards, we have changed our performance rating labels and definitions. Please refer to the online

rating definitions for a detailed description of each performance category.

Performance Rating Distribution
We are moving toward a targeted distribution to more effectively recognize and reward performance. More information on the target distribution and VIP payout guidelines for FY06 is available online.

Key Dates
Key dates in this year's process include:

Sept. 5	You can begin your self assessment immediately by logging on to the VPM
Sept. 29	Last day to complete your self assessment in the VPM
Oct. 17	Managers may begin holding reviews with staff, but will not be discussing pay or VIP
Nov. 7	Managers continue review discussions and may begin communicating pay and VIP decisions to staff
Nov. 22	VIP payouts distributed to employees
Nov. 30	Your paycheck will include any salary increase retroactive to 11/1
Dec. 15	Final opportunity to electronically acknowledge review and comment

Resources and Support
Tools to support you in this process are available in the Pay & Performance section of the HR Web site.

Human Resources will also hold brown bag sessions

for employees to review the changes to our performance management programs and answer questions about Common Review. Sessions are scheduled for various locations and times will be made available in an upcoming Visa News Brief and the September HR Monthly.

If you have questions about this year's process, please work with your manager or your HR Generalist or attend one of the upcoming brown bag sessions. You can also review the FAQ document on the HR Web site.

From: Yim, Kin
Sent: Wednesday, October 11, 2006 12:58 PM
To: Yao, Jim
Subject: RE: original TEC alerts

Thanks! I am glad to hear that the memory leak issue is fixed. Great job!

Kin

From: Yao, Jim
Sent: Wednesday, October 11, 2006 9:56 AM
To: Yim, Kin
Subject: RE: original TEC alerts

i do not have yesterday's log but the first time. I attached that to you. By the way, the memory leak is fixed. I will check revised code late.

Thanks,
Jim

From: Yim, Kin
Sent: Wednesday, October 11, 2006 12:53 PM
To: Yao, Jim
Subject: original TEC alerts

Jim,

During the test yesterday with Ming, do you have a log for the original TEC alert strings that the listener received? If you do, can you send that to me?

Thanks,
Kin

From: Yao, Jim
Sent: Wednesday, November 01, 2006 3:57 PM
To: Yim, Kin
Subject: Listener self suspension and Alert cache

Kin,

Since you mentioned we should start thinking again these two functions, i continue our previous discussion here:

1) I will build a mechanism that monitor and count coming alerts in some time unit that can be configured (registry). Once the alerts reach that threshold then the receiving socket suspend itself and stop accepting connection from client. Technically we can stop the service. I will do some prototype after PEClistener.

We may want to build some notification mechanism here to notify admins of what happen.

2) Like i said before, we might need a SQL server database to store alerts that are not created successfully and retrieve them then try to create them again late. Or we can save all alerts in database and flag created ones by searching the Incident database.

Thanks,
Jim

From: Drummond, Tracy
Sent: Wednesday, November 08, 2006 12:47 PM
To: Cordova, Fred; Rosas, Sergio; Ross, Karen; Washington, Eric; Yao, Jim
Subject: Group Goals and your performance reviews

Importance: High
Attachments: Picture (Metafile)
Two important items.

1> I would like each of you to state three group goals for GIPCE for FY07. I will use these when considering the goals for the year and value your input.

2> Please go to VPM https://careertracker.kenexa.com/visapprs/login/loginscreen.asp?logout=1&sid=1 and provide your performance review comments then electronically sign and submit.

Once number 2 is complete we can finish up your performance reviews and I can communicate salary changes and bonus information to each of you.

Tracy W. Drummond
VISA

Director, Global Systems Management | ITIL, PMP, CISSP, HPOV-CC, IEEE
650-432-3498 | cell 650-823-2030 |
trdrummo@visa.com

From: Yim, Kin
Sent: Thursday, November 09, 2006 4:37 PM
To: Yao, Jim
Subject: RE: PEC testing next week

Jim,

Thanks, same here.

Before your vacation, could you send me an email to describe the state of the PECListener (for example, what still need to be done etc.)?

If you don't mind, could you also provide me a quick description on how you install the windows services? We may need to include that into the Run Book as part of the installation/configuration instructions.

Thanks and enjoy your vacation. I hope your son can get well soon.

Kin

From: Yao, Jim
Sent: Thursday, November 09, 2006 1:34 PM
To: Yim, Kin
Cc: Ho, Ming
Subject: RE: PEC testing next week

It will be all yours. I believe you can handle it very smoothly. I have been very enjoying working with you.

Happy Thanksgiving!
Jim

From: Yim, Kin
Sent: Thursday, November 09, 2006 4:24 PM
To: Ho, Ming; Yao, Jim
Subject: RE: PEC testing next week

Jim,

Since you will be on vacation starting next week, will you be comfortable enough to have me test this for you next week?

Thanks,
Kin

From: Ho, Ming
Sent: Thursday, November 09, 2006 11:30 AM
To: Yim, Kin; Yao, Jim
Subject: PEC testing next week

Hi Kin, Jim,

I am very busy on a couple projects since tomorrow is the last day for change in production before the freeze.
Can we test it sometime next week?

Thanks.
Ming

From:	Ho, Ming
Sent:	Tuesday, November 28, 2006 6:48 PM
To:	Yim, Kin; Yao, Jim
Subject:	Send acknowledgement to ppi

Hi Kin, Jim

I just realized that after you receive a ppi/PEC event, you need to send back the work "Received" (without quotes) to ppi through the same port. Otherwise ppi will cache the event and resent it again next time it send a new alert.

Thanks.
Ming

From: Visa HR
Sent: Monday, December 11, 2006 12:19 PM
Subject: Deadline Reminder: Acknowledge Review by December 15

To: All Visa USA and Inovant Employees
From: Visa HR
Date: December 11, 2006
RE: Deadline Reminder: Acknowledge Review by December 15

The final step in the year-end performance management process is for employees to acknowledge their reviews in the Visa Performance Management (VPM) system. You have until December 15 to acknowledge your review in the system.

While it is not a required step, it is an opportunity for you to look over your review and write comments before the record is locked in the system.

When you log into the VPM:

- Select Access Reviews from the Home Page
- Select Annual Performance Review under Current Reviews and click Select Review
- Select Final Step: Employee Comments in the drop down menu and click Go
- Complete the process by typing your name into the electronic signature box and click Submit

If you have any questions, please contact the HR Generalist at your location for assistance.

From: Yim, Kin
Sent: Monday, March 12, 2007 2:26 PM
To: Yao, Jim
Subject: RE: Memory leaking in listener

Jim,

Yes, the memory leak and cpu problems were resolved by you before the production. There is no issue on these now as far as I can tell.

In terms of the listener, I did add a few things to the listener such as flood control, acknowledgement return, etc. I also removed some code on the TEC alert header handling. That part of the code is not necessary and may cause problem.

It is also in my plan to change the current error handling code.

Kin

From: Yao, Jim
Sent: Monday, March 12, 2007 1:18 PM
To: Yim, Kin
Subject: Memory leaking in listener

Kin,

I remember clearly that I have fixed the memory leak in listener along with cpu time overhead. You also told me that you only added something but not fix my part of codes. Can you please confirm that?

Thanks,
Jim